

## REFORM IN FEDERAL PENAL PROCEDURE: THE FEDERAL CORRECTIONS AND PAROLE IMPROVEMENT BILLS

MODERN penology seeks to make the punishment fit the criminal rather than the crime.<sup>1</sup> Abandoning almost completely Beccaria's nineteenth-century doctrine that there should be a fixed scale of penalties based upon the assumed magnitude of various crimes,<sup>2</sup> courts now attempt to differentiate among offenders, as well as offenses.<sup>3</sup> Underlying this individualization of sentencing is the belief that only through close analysis of each prisoner will that sentence be imposed which most effectively integrates the objectives of the criminal law.<sup>4</sup> These "objectives" have been variously identified as: the prevention of private revenge by public exaction of retribution and expiation;<sup>5</sup> the exemplary treatment of prisoners so as to exert a deterrent influence upon potential offenders;<sup>6</sup> the segregation of those unwilling or unable to meet society's minimum standards;<sup>7</sup> and the reformation of criminals.<sup>8</sup> Since deterrence is at best a negative control, segregation effective only so long as it continues, and retribution merely retaliatory rather than corrective in aim, penological experts now believe that treatment which places primary emphasis upon reformation renders maximum service to the community.<sup>9</sup>

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1. See Cohen, *Moral Aspects of the Criminal Law* (1940) 49 YALE L. J. 987, 1019-1022; McGuire and Holtzoff, *The Problem of Sentence in the Criminal Law* (1940) 20 B. U. L. REV. 423, 424; Ullman, *Dead End Justice* 33 J. AM. INST. CRIM. L., 6, 7-8.

2. See BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1801) c. VI.

3. LOMBROSO'S TRATTATO ANTROPOLOGICO SPERIMENTALE DELL'UOMO DELINQUENTE (1876) was one of the first treatises suggesting that emphasis in the designation of punishment be shifted from the crime committed to the individual criminal. Modern criminologists have adopted and expanded Lombroso's theories regarding sentence individualization. See Cohen, *supra* note 1, at 1019 *et. seq.*; McGuire and Holtzoff, *supra* note 1, at 424.

4. See *Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H. R. 2139 and H. R. 2140*, 78th Cong., 1st Sess. (1943) 121 (hereinafter cited as *House Hearings*).

5. For expositions of the history of this theory, see HOLMES, *THE COMMON LAW* (1881) 39 *et. seq.*; 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* (1883) 79 *et seq.*; Cohen, *supra* note 1, at 1009, 1014. The public retribution doctrine is essentially an adoption and refinement of the traditional rule of *lex talionis*. See Holmes, *supra*, 40 *et seq.*

6. ASCHAFFENBURG, *CRIME AND ITS REPRESSION* (Albrecht's trans. 1913) 259; SELLIN, *CRIME* (1942) 37-39.

7. See WAITE, *THE PREVENTION OF REPEATED CRIME* (1943) 44-45.

8. See WAITE, *CRIMINAL LAW IN ACTION* (1934) 313-314; WAITE, *op. cit. supra* note 7, *passim*.

9. The aims of contemporary criminal law are explained in WOOD AND WAITE, *CRIME AND ITS TREATMENT* (1941) 345-357; GLUECK AND GLUECK, *CRIMINAL CAREERS IN RETROSPECT* (1943) 287-292; see also Cohen, *supra* note 1, at 1012.

The process of reformation of criminals consists of three major steps.<sup>10</sup> First, individual treatment must be prescribed for each offender. Next, the rehabilitating treatment must be administered in institutions where the offender may be taught a trade and helped to adjust himself to society. Finally, there must be a gradual transition from restricted institutional to free communal life. To facilitate this three-fold process a federal system of parole<sup>11</sup> and probation<sup>12</sup> was developed to supplement the older techniques of imprisonment<sup>13</sup> and executive pardon.<sup>14</sup>

Numerous procedural impediments, however, have in the past hampered operation of the parole process and impeded reformation.<sup>15</sup> Reforms designed to eliminate certain of these procedural defects and to integrate the parole and sentencing processes have been embodied in the recently proposed Federal Corrections<sup>16</sup> and Parole Improvement Bills.<sup>17</sup> It is the purpose of this Comment to examine the inadequacies of the current system and to evaluate the proposed changes.

#### PRESENT PENAL PROCEDURES

*Diagnosis and Sentencing.* Adequate diagnosis of the individual offender is an indispensable prerequisite to proper sentencing.<sup>18</sup> Present statutes<sup>19</sup> seek individualization of treatment by granting federal judges broad discretionary sentencing powers.<sup>20</sup> For most offenses, only maximum penalties are prescribed, and courts may, within these limits, impose any fine or prison

10. See *House Hearings* at 47.

11. See 4 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) (hereafter cited as SURVEY). The first Federal Parole Act was adopted in 1910. 36 STAT. 819 (1910), 18 U. S. C. §§ 714-723 (1940).

12. The first Federal Probation Act was adopted in 1925. 43 STAT. 1259-1260 (1925), 18 U. S. C. §§ 724-727 (1940). See 2 SURVEY, *op. cit. supra* note 11.

13. See 5 SURVEY, *op. cit. supra* note 11.

14. See 3 SURVEY, *op. cit. supra* note 11.

15. Criticism of the present federal system has been widespread. See *e.g.* Statements in *House Hearings* of Hon. John J. Parker, Senior Circuit Judge, 4th Circuit, at 5; Francis Biddle, U. S. Attorney General, at 15; Hon. Orie L. Phillips, Senior Circuit Judge, 10th Circuit, at 29; George W. Pepper, President of American Law Institute, at 37; George M. Morris, President of American Bar Association, at 41; William D. Lewis, Director of American Law Institute, at 43; Arthur T. Vanderbilt, at 79; James V. Bennett, Director of U. S. Bureau of Prisons, at 93. Editorial, *For a Better Deal in Criminal Justice*, THE SATURDAY EVENING POST, Dec. 11, 1943.

16. H. R. 2140, 78th Cong., 1st Sess. (1943) (hereafter cited as H. R. 2140).

17. H. R. 2139, 78th Cong., 1st Sess. (1943) (hereafter cited as H. R. 2139).

18. See *House Hearings* at 47, 75, 102, 122. For the relation between scientific findings and the criminal law see Aschaffenburg, *Psychiatry and the Criminal Law* (1941) 32 J. AM. INST. CRIM. L. 3; SELLIN, CRIME (1942) 30-36.

19. 18 U. S. C. (1940).

20. See generally McGuire and Holtzoff, *supra* note 1, at 425.

term deemed desirable.<sup>21</sup> Moreover, in any case where the judge believes it advantageous, pronouncement or execution of sentence may be suspended, and the prisoner placed on probation.<sup>22</sup> Because of the opportunity for error afforded by such broad discretion and in order to facilitate individual diagnosis, pre-sentence investigations<sup>23</sup> were made available to trial judges under the Federal Probation System, established in 1925.<sup>24</sup>

Under this system, the district probation officer is required, at the request of the trial judge, to prepare a report on the offender's criminal record and status in the community. Authorities believe, however, that accurate diagnosis is not feasible in the absence of examination of offenders by competent physicians, psychologists, and social workers;<sup>25</sup> and that few district probation officers now have such assistance.<sup>26</sup> Moreover, extrinsic obstacles, such as suspicion of government agents by the defendant's family and friends, have interfered with the examinations.<sup>27</sup> In addition, the investigations are often unduly hurried, since they usually are initiated after the jury's verdict—at which point most courts favor prompt sentencing.<sup>28</sup> In fact, because of these deficiencies and of the tendency to sentence quickly to save expense when the offender pleads guilty,<sup>29</sup> pre-sentence investigations are currently made in less than half of the cases.<sup>30</sup>

Striking disparities among the judicial districts in the use of probation and in the severity of sentences demonstrate the failure of the present system to

21. In a case of misprision of treason, for example, the penalty may be a fine not exceeding \$1,000, imprisonment for not more than seven years, or both. 35 STAT. 1038 (1909), 18 U. S. C. § 3 (1940).

22. 43 STAT. 1259 (1925), 18 U. S. C. § 724 *et seq.* (1940). Prior to this act it had been held that federal courts had no inherent power to suspend indefinitely execution or imposition of sentence. *Ex parte United States*, 242 U. S. 27 (1916). For a description of the development of the federal probation system see Bates, *The Growth and Future of the Federal Probation System* in GLUECK, PROBATION AND CRIMINAL JUSTICE (1933) 250. See also 1 SURVEY, *op. cit. supra* note 11, at 1-15.

23. 43 STAT. 1260 (1925), 18 U. S. C. § 727 (1940). See 1 SURVEY, *op. cit. supra* note 11, at 10; 2 *id.* at 125-216; *House Hearings* at 123; Hincks, *Proposed Legislation Relating to Federal Offenders* (1942) 16 CONN. B. J. 97.

24. 43 STAT. 1259, 1260 (1925), 18 U. S. C. §§ 724, 727 (1940).

25. See SUTHERLAND, CRIMINOLOGY (1924) 565; 2 SURVEY, *op. cit. supra* note 11, at 150; *Hearings* at 6-7, 123.

26. See 2 SURVEY, *op. cit. supra* note 10, at 209 *et seq.*; SUTHERLAND, *loc. cit. supra* note 25.

27. SUTHERLAND, *loc. cit. supra* note 25.

28. See 2 SURVEY, *op. cit. supra* note 11, at 175.

29. Although no official figures are available, it is said that the majority of federal offenders plead guilty. See *House Hearings* at 124.

30. See *House Hearings* at 123. While statistics show a steady increase in the percentage of probationers investigated prior to probationary release (from 24.4 per cent in 1936 to 64.5 per cent in 1940), there are no figures available to show what percentage of the total offenders are investigated before sentence. See FEDERAL OFFENDERS: 1940 (U. S. Dep't Just. 1941) 418-419; 2 SURVEY, *op. cit. supra* note 11, at 209.

base treatment of offenders upon consistent penological norms.<sup>31</sup> In some cases, of course, sentencing differences are the result of variations in the types, and frequency of offenses committed by and in the treatment needs of, offenders;<sup>32</sup> more often, however, they appear to have resulted mainly from the divergent notions of penal policy entertained by individual judges.<sup>33</sup> Thus, sentences imposed on two hundred and seventy members of Jehovah's Witnesses, convicted of violation of the National Selective Service Act,<sup>34</sup> have ranged from one to five years, despite the group's homogeneity of religion and education, and an apparent common absence of a prior criminal history.<sup>35</sup> Similarly, sentences received by two hundred and eighty-one Italian sailors convicted of sabotage of Italian boats in United States harbors varied from three months to five years;<sup>36</sup> while the officers of these boats, who had directed the sabotage, received sentences one-half to one-third shorter in some cases than those imposed on the ordinary seamen.<sup>37</sup> Gross statistics, although less conclusive, indicate a like absence of uniform standards. Thus, the average sentence for violation of the National Motor Vehicle Theft Act<sup>38</sup> during the fiscal year ended June 30, 1943, ranged from 10 months in the Northern District of New York to 43.9 months in the Middle District of Tennessee.<sup>39</sup> The percentage of all convicted offenders placed on probation during the same period varied from more than fifty per cent in 21 districts<sup>40</sup> to less than twenty-five per cent in 11 districts.<sup>41</sup> Such disparities demonstrate that the present procedures result in inadequate diagnosis of offenders at the initial phase of reformation.<sup>42</sup>

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31. See *House Hearings* at 7, 16, 27, 42, 75, 87, 93-96, 125-132; Hincks, *supra* note 23, at 100; McGuire and Holtzoff, *supra* note 1, at 426.

32. See *House Hearings* at 15-17; Kirchwey, *The Prison's Place in the Penal System* (1931) 157 ANNALS 13, 19.

33. An excellent study of varying penological norms of judges even in the same court is found in Gaudet's analysis of sentences imposed over a ten year period by the Court of Common Pleas of one New Jersey county. GAUDET, *INDIVIDUAL DIFFERENCES IN THE SENTENCING TENDENCIES OF JUDGES* (1938); see also Gaudet, Harris, and St. John, *Individual Differences in the Sentencing Tendencies of Judges* (1933) 23 J. AM. INST. CRIM. L. 811. Presumably, the same disparities are present in the federal system.

34. 54 STAT. 885, 50 U. S. C. §§ 301 *et seq.* (1940).

35. See *House Hearings* at 128.

36. *Ibid.*

37. Other seemingly unjustifiable cases are given in *House Hearings* at 128-130.

38. 41 STAT. 324 (1919), 18 U. S. C. § 408 (1940). This statute is commonly known as the Dyer Act.

39. FEDERAL PRISONS: 1943 (U. S. Dep't Just. 1944) 58-61.

40. *Id.* at 76. The Middle District of Alabama probationed 78.7 per cent of its offenders.

41. *Ibid.* The District of Utah probationed only 6.6 per cent of its offenders.

42. The reduction of excessive or illegal sentences by appellate courts or pardon boards as one means of mitigating obviously unfair treatment is discussed in Hall, *Reduction of Criminal Sentences on Appeal* (1937) 37 CFL. L. REV. 521, 762. Hall finds such a method generally uncertain. *Id.* at 783.

*Rehabilitation.* Probation and imprisonment are the two prevailing techniques for rehabilitating adult federal offenders. Under present probation methods, the offender is released conditionally, under the supervision of the district probation officer.<sup>43</sup> This is said to permit youthful and unhardened offenders "to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable."<sup>44</sup> Upon a breach of the conditions of his probation, such as failure to report to the probation officer or departure from a prescribed area, the probationer reverts to his status as of the time of conviction,<sup>45</sup> and the original sentence may then be reimposed.<sup>46</sup> Once the offender is sentenced to a prison term, custody by the judiciary ceases;<sup>47</sup> he is then classified by the Bureau of Prisons<sup>48</sup> to serve in a maximum, medium or minimum security type of penitentiary.<sup>49</sup>

The availability of medical facilities in federal penitentiaries ordinarily tends to improve physical health;<sup>50</sup> but, after successful adjustment to prison life, the released convict is often less capable of normal societal existence than he was before confinement.<sup>51</sup> Moreover, association with other criminals may counterbalance vocational efforts toward rehabilitation.<sup>52</sup> Reform in rehabilitation procedures, however, must await development of more effective

43. Probation officers are appointees of the federal district courts. 43 STAT. 1260 (1925), 18 U. S. C. § 726 (1940). They supervise both probationers and parolees, reporting to the district court on the former and the Parole Board on the latter. For criticism of this dual function, see Hincks, *supra* note 23, at 99.

The power to probation prisoners has been held not to encroach on the constitutional pardoning power of the President. *Riggs v. United States*, 14 F. (2d) 5 (C. C. A. 4th, 1926); *Nix v. James*, 7 F. (2d) 590 (C. C. A. 9th, 1925).

44. *Burns v. United States*, 287 U. S. 216 (1932).

45. 43 STAT. 1260 (1925), 18 U. S. C. § 725 (1940).

46. In *Roberts v. United States*, 320 U. S. 264 (1943), it was held that after revocation of probation, the trial court could only reimpose the original sentence; it could not impose a stiffer sentence, even if that had been possible originally. The language of the statute, however, would appear to dictate the contrary interpretation. 43 STAT. 1260 (1925), 18 U. S. C. § 725 (1940). See Puttkammer, Comment (1944) 11 U. CHI. L. REV. 226.

47. See Hincks, *supra* note 23, at 97-98.

48. The Attorney General "or his authorized representative" designates the place of confinement of prisoners. 46 STAT. 326 (1930), 18 U. S. C. § 753(f) (1940). In practice, such representative is the Bureau of Prisons.

49. For an exhaustive study of the nation's prisons see 5 SURVEY, *op. cit. supra* note 11, at 308-478.

50. *Id.* at 342 *et seq.*

51. See HEALY, *THE INDIVIDUAL DELINQUENT* (1929) 310; WAITE, *op. cit. supra* note 7, at 27-28; Kirchwey, *supra* note 32, at 20.

52. Many prisons are badly overcrowded, interfering with constructive efforts toward reformation. See WOOD AND WAITE, *op. cit. supra* note 9 (1941) 541; 5 SURVEY, *op. cit. supra* note 11, at 313-316. In addition, the problem of finding markets for products of penitentiary industry in the face of organized labor has hampered efforts at vocational rehabilitation. See TAFT, *CRIMINOLOGY* (1942) 475-476; Gill, *The Prison Labor Problem* (1931) 157 ANNALS 83.

therapeutic techniques by psychologists and criminologists,<sup>53</sup> since the present state of knowledge in these fields appears to afford insufficient guidance to legislators.

*Readjustment.* After imprisonment, gradual readjustment to normal life has been sought through discretionary use of the parole system.<sup>54</sup> When a prisoner has served one-third of his sentence,<sup>55</sup> less the time allowed for good behavior,<sup>56</sup> the Federal Parole Board may release him conditionally. The district probation officer, under whose control the offender remains for the balance of his sentence, is charged with supervising his readjustment.<sup>57</sup>

The functioning of the parole process is now hampered because of the failure to integrate the paroling authority of the Board and the sentencing authority of the courts.<sup>58</sup> Imposition of an excessive prison term, as a result of inadequate pre-sentencing diagnosis,<sup>59</sup> may render later readjustment through parole unfeasible.<sup>60</sup> On the other hand, if the sentence is too short, the period of parole aid may not be sufficient to consummate readaptation to normal life.<sup>61</sup> The present rules place readily reclaimable prisoners, who because of good behavior are released soon after becoming eligible, under parole supervision for a longer period than less tractable offenders.<sup>62</sup> Moreover, in determining a prisoner's eligibility for parole, the Board has in the past often neglected to consult the sentencing judge, as to his observations of the offender during trial and his reasons for selecting the particular term of confinement.<sup>63</sup>

A recent case, *Tippett v. Wood*,<sup>64</sup> illustrates the deficiencies inherent in the present procedure. While on parole after serving four years of a six-year

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53. See WAITE, *op. cit. supra*, note 7, *passim*; Gehlke, *Testing the Work of the Prison* (1931) 157 ANNALS 121, 129-30; Sutherland, *The Prison as a Criminological Laboratory* (1931) 157 ANNALS 131, 136.

54. See generally BEST, CRIME AND THE CRIMINAL LAW IN THE UNITED STATES (1930) c. XLVI; Scott, *The Discharged Prisoner* (1931) 157 ANNALS 113. For a study of the history and function of paroling, see 4 SURVEY, *op. cit. supra* note 11, at 1-39.

55. Prisoners serving life terms are eligible for parole after fifteen years. 37 STAT. 650 (1913), 18 U. S. C. § 714 (1940).

56. 32 STAT. 397 (1902), 18 U. S. C. § 710 (1940). Depending upon the length of term imposed, a prisoner is entitled to good behavior deductions of from 5 to 10 days of each month of his original sentence.

57. Thus, probation officers supervise probationers for the courts and parolees for the Parole Board. For criticism of this dual function, see REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) 9-10; Hincks, *supra* note 23, at 98-99.

58. See *House Hearings*, at 7-8, 47.

59. *Ibid.* at 133 *et. seq.*

60. WAITE, *op. cit. supra* note 7, at 27-28.

61. See Hincks, *supra* note 23, at 98-99; REPORT TO THE JUDICIAL CONFERENCE OF THE SUBCOMMITTEE ON PUNISHMENT FOR CRIME (1941) 5.

62. See Hincks, *loc. cit. supra*, note 61.

63. See *House Hearings* at 7.

64. *Tippett v. Wood et al.*, as Members of the United States Parole Board, 140 F. (2d) 689 (App. D. C. 1944).

term imposed for violation of the National Motor Vehicle Theft Act.<sup>65</sup> Tippitt was convicted of mail robbery. A federal district court in Texas thereupon sentenced him to a four-year term, to run concurrently with the unexpired portion of his previous sentence. The Parole Board, however, delayed Tippitt's arrest for parole violation until expiration of the new four-year term. Tippitt then sought to obtain release in a mandamus action in the District Court for the District of Columbia. In dismissing the complaint, the court held that the district court in Texas has lacked jurisdiction to order revocation of the existing parole and simultaneous service of both terms.<sup>66</sup> By thus thwarting the offender's expectation of freedom, this jurisdictional conflict may well have greatly increased the difficulty of reformation.<sup>67</sup>

Most indicative of the failure of the federal penal system to achieve reformation is the prevailing high degree of recidivism. From forty-five to eighty per cent of all convicted federal offenders commit crimes subsequent to release.<sup>68</sup> Slightly more than half of the men and women committed to federal prisons during the fiscal year ended June 30, 1943, had records of previous commitments.<sup>69</sup> During the three-month period of July-September, 1941, 96% of the prisoners received in federal prisons had at least one prior conviction.<sup>70</sup> The special youth problem is indicated by the fact that nearly one-half of these prisoners were convicted for the first time before they were twenty-four; furthermore, of those under twenty-four at the time of admission to prison, approximately eighty per cent were recidivists.<sup>71</sup> This high rate of

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65. 41 STAT. 324 (1919), 18 U. S. C. § 408 (1940).

66. The opinion reads in part: "This direction [that the sentences run simultaneously] lacked legal validity; for Judge Allred [of the Texas Court] had no power to tell the Board how it must act in the light of Judge Allred's sentence. It is equally true that the Board could have issued no instructions to Judge Allred as to how he [in pronouncing the second sentence], must act in the light of the Board's previous action. The two jurisdictions are separate and distinct, each from the other. Unto the Board must be rendered the things that are the Board's; to the judge, the things that are the judge's." *Tippitt v. Wood*, 140 F. (2d) 689, 692 (App. D. C. 1944). Judge Allred's unreported decision was rendered in October, 1939.

67. See Arnold, J.'s dissent, *id.* at 693.

68. See WAITE, *op. cit. supra* note 7, at 22-23; REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) 33-34.

69. FEDERAL PRISONS: 1943 (U. S. Dep't Just. 1944) 84. Of the 4,548 recidivists, constituting 50.2 per cent of those committed, 18.1 per cent had one prior commitment, 11.3 per cent two, and 20.8 per cent had three or more. These figures err, if at all, on the low side, since it is believed that some previous convictions are unadmitted and undiscovered. See WAITE, *op. cit. supra* note 7, at 23.

70. REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) 49, 52.

71. *Ibid.* There has been a considerable increase in juvenile delinquency during the present war. UNIFORM CRIME REPORTS: ANNUAL BULLETIN, 1943 (U. S. Dep't Just. 1944) 93, 95.

crime repetition, especially among youthful offenders,<sup>72</sup> is obviously largely caused by social and economic factors beyond the control of the penal system, such as adverse childhood, familial or neighborhood relations, low intelligence, the incidence of economic depressions,<sup>73</sup> public mistrust of ex-convicts,<sup>74</sup> or the enactment of new types of penal legislation.<sup>75</sup> Nevertheless, alteration of present corrective procedures, though no panacea for recidivism, would be of considerable aid in coping with the problem of crime repetition.

#### PROPOSED REFORMS

The proposed Federal Corrections<sup>76</sup> and Parole Improvement<sup>77</sup> Bills embody many of the needed changes in penal administration. By eliminating the major procedural defects in the present sentencing, correctional, and releasing processes, the suggested Federal Corrections Bill facilitates reformation. In place of the present overworked United States Parole Board,<sup>78</sup> a new Board of Corrections<sup>79</sup> is created, composed of ten members appointed by the Attorney General.<sup>80</sup> To facilitate administration of special problems with respect to youthful offenders, the new Board is divided into two main committees:<sup>81</sup> the Youth Authority and the Adult Corrections Division.<sup>82</sup>

72. A general critical survey of the young offender problem is contained in SELLIN, *THE CRIMINALITY OF YOUTH* (1940).

73. See BONGER, *PRINCIPLES OF CRIMINOLOGY* (Eng. Ed., 1916); Stern, *The Effect of the Depression on Prison Commitments and Sentences* (1941) 31 J. AM. INST. CRIM. L. 696. For a broader discussion of ecological influences tending to produce crime in urban communities, see ALEXANDER AND HEALY, *ROOTS OF CRIME* (1935); SHAW AND Co-WORKERS, *BROTHERS IN CRIME* (1938).

74. See 4 SURVEY, *op. cit. supra* note 11, at 32; SHAW, Preface to WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* (1922) xviii; Scott, *supra* note 54 at 116.

75. An excellent example is the National Selective Service Act. 54 STAT. 885, 50 U. S. C. §§ 301 *et seq.* (1940). See FEDERAL PRISONS: 1943 (U. S. Dep't Just. 1944) 10-13; TART, *CRIMINOLOGY* (1942) 335-336. For a valuable discussion of the reasons for differential treatment of recidivists, keyed in part to the specific types of crimes committed, see Des-  
sion, Book Review (1944) 57 HARV. L. REV. 394.

76. H. R. 2140. See FEDERAL PRISONS: 1943 (U. S. Dep't Just. 1944) 25-26; Phillips, *Proposed Federal Corrections Act* (1942) 9 LAW & CONTEMP. PROB. 650.

77. H. R. 2139.

78. Created by 46 STAT. 272 (1930), 18 U. S. C. § 723(a) (1940).

79. H. R. 2140, tit. I, § 1.

80. The Attorney General also appoints the three members of the present Parole Board. 46 STAT. 272 (1930), 18 U. S. C. § 723(a) (1940).

81. H. R. 2140, tit. I, § 3.

82. It has been suggested that a ten-man board is not sufficient to handle the daily case loads. Assuming that the figures for 1942 are typical, the Youth Authority in a normal year would have custody of approximately 4,450 cases, and the Adult Division of approximately 11,650 cases. With time off for traveling between penitentiaries, it is expected that the members of the Division and Authority would have 250-day years. Daily case loads then would be 6.45 per man. This compares favorably with the 11.7 daily case load for each member of the present Board of Parole. See *House Hearings* at 147-8. Both sets of



The operation of these committees is integrated by a Policy Division, composed of one member from each committee and the Director of the Bureau of Prisons.<sup>83</sup>

*Diagnosis and Sentencing.* Under the proposed system, when an adult prisoner's term is to exceed one year, the trial judge would impose a tentative sentence of the maximum term<sup>84</sup> provided by law and forward all case records and documents to the Adult Corrections Division. The process of scientific diagnosis is to be commenced upon commitment to a federal penal institution,<sup>85</sup> where the offender is to be examined by members of the prison's staff—physician, psychologist, psychiatrist, educational supervisor, occupational therapist, chaplain, and social worker.<sup>86</sup> A comprehensive case history would then be compiled, describing the prisoner's background, intellectual capacities and interests, vocational aptitudes, physical and mental condition, and also containing an evaluation by the examiners of his probable future reaction to various penal treatments. One or more members of the Adult Corrections Division would then study the case history, as well as other records, and interview the prisoner, to appraise his correctional needs. At the interview,<sup>87</sup> the offender would have the right to present any pertinent material. Within six months after the trial court's imposition of the tentative maximum sentence and after consideration of the pertinent data,<sup>88</sup> a quorum of the Division<sup>89</sup> would recommend a sentence to the trial court.<sup>90</sup> If the trial judge does not pronounce sentence within two months after receipt of the Division's findings, its recommendations would become final.<sup>91</sup> Whether or not the judge exercises his powers

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figures are based on the assumption that each case is considered by only one member of the supervising authority. To the extent that the proposed increase in personnel permits consideration of cases by more than one member, the disparity in daily case loads will be reduced. But the increased accuracy in diagnosis resulting from dual consideration of the data should be an equally valuable gain.

83. H. R. 2140, tit. I, § 3. Section 4 of H. R. 2140 reads: "The Policy Division shall hold stated meetings to consider problems of treatment and correction and shall lay down general treatment and correctional policies which the Director, in the administration of the penal and correctional system, shall carry out."

84. H. R. 2140, tit. II, § 1. This provision was inserted to forestall claims of unconstitutionality. See *House Hearings* at 9.

85. *Id.* at 141.

86. *Id.* at 134, 141; 5 *SURVEY*, *op. cit. supra* note 11, at 318-325. For a discussion of the problems of prison administration see Bates, *Prison Administration* (1931) 157 *ANNALS* 53.

87. H. R. 2140, tit. II, § 2.

88. If deemed advisable, the court may authorize an additional six months for observation and study. H. R. 2140, tit. II, § 1.

89. H. R. 2140, tit. II, § 3 refers merely to the "Division" as making recommendations, but Federal Prison Director Bennett's Reference Notes on the Federal Corrections Act speak of a "quorum of the Division" as doing this. See *House Hearings* at 143.

90. H. R. 2140, tit. II, § 3.

91. *Ibid.*

to accept, modify or reject the Division's recommendations,<sup>92</sup> it is expected that the data made available by the new procedures would permit more scientific sentencing. Moreover, because of the uniform norms which the Division's continuous studies would presumably develop, disparities in sentencing due merely to the idiosyncracies of individual judges would probably be reduced.<sup>93</sup>

To combat recidivism at one of its main sources,<sup>94</sup> the proposed Federal Corrections Bill provides, for offenders under 24 years of age,<sup>95</sup> an even more flexible and tentative sentencing process. The trial judge is given the alternatives of placing "youthful offenders" on probation, sentencing them as adults pursuant to the new procedures, or committing them to the Youth Authority.<sup>96</sup> However, under the recently adopted Federal Juvenile Delinquency Act,<sup>97</sup> delinquents 17 years of age or younger may not be retained in custody after they reach their majority.<sup>98</sup>

That the choice of alternatives is left to the trial judge is perhaps the Corrections Bill's greatest deficiency. While there are many "youthful offenders" who are and should be treated as hardened criminals, the proposed Youth Authority is presumably better equipped than non-specialist judges to decide which offenders belong in this category. Thus, the American Law Institute's model Youth Authority Act makes it mandatory, with minor exceptions, to remit youthful offenders to the custody of the Authority.<sup>99</sup>

92. This retention of the trial judge's power to fix final sentence should prevent opposition to the bill on the grounds that it unconstitutionally delegates judicial functions to the executive.

93. See *House Hearings*, at 134-135, for a discussion of the handicap faced by judges who do not have the benefits of such technical assistance. See also WARNER AND CABOT, *JUDGES AND LAW REFORM* (1936) c. III.

94. See *House Hearings* at 135-144; SELLIN, *loc. cit. supra* note 72; Evjen, *Delinquency and Crime* (1942) 33 J. AM. INST. CRIM. L. 136; Glueck, *Wartime and Delinquency* (1942) 33 J. AM. INST. CRIM. L. 119.

95. Many scientists now believe that mental and physical maturity is normally reached at 24. See *House Hearings* at 139. The English Borstal System, designed for the same purpose as the Youth Authority, at first used 21 as the upper limit, but later revised it upwards to 23. For a description of the Borstal System, see REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) 53; *House Hearings* at 140-141.

96. H. R. 2140, *op. cit. supra* note 76, tit. III, § 1.

97. 52 STAT. 764-766 (1938), 18 U. S. C. §§ 921-929 (1940).

98. By H. R. 2140, tit. IV, § 2, the custody and parole of juvenile delinquents under sections 4 and 7 of the Federal Juvenile Delinquency Act are transferred to the Authority from the Board of Parole.

99. Youth Correction Authority Act (Official Draft), American Law Institute, June 22, 1940, § 13. See also *Proposed Youth Correction Act* (1944) 28 MINN. L. REV. 300. H. R. 2140, tit. III, borrows extensively from this model act, proposed for offenders under 21. With some modifications, the act was adopted by California in 1941. CAL. CODES, GEN. LAWS & CONST. (Deering, Supp. 1941) *Welfare and Institutions Code* §§ 1700-1793. A shortened version of the Act was adopted in New York, but restricted in application to defendants between the ages of 16 and 19. Even as to persons in these age groups, however, application of the special provisions of the Act was made wholly dis-

Once the offender is placed under the Youth Authority's custody, however, the court relinquishes all jurisdiction.<sup>100</sup> The Authority then designates a classification center, where the offender undergoes a thirty-day examination, analogous to that provided for adults.<sup>101</sup> On the basis of this examination, the Authority determines whether the offender should be committed to an institution where incorrigibles are segregated, released under proper supervision, or treated by available rehabilitation techniques.<sup>102</sup> Review of cases at six-month intervals permits constant alteration of earlier diagnoses, on the basis of the offender's response to treatment.<sup>103</sup>

Constitutional objections to the proposed sentencing procedure, on the ground that it effects an improper delegation of judicial power to the Executive Department, would appear to be unwarranted.<sup>104</sup> More advanced procedures have long been followed in thirty-eight states and territories,<sup>105</sup> where

cretionary with the trial judge. LAWS OF NEW YORK (1943) c. 549. The model act is extensively discussed in 9 LAWS AND CONTEMP. PROB. (1942) 579-764. See also Ulman, *supra*, note 1, at 6.

100. H. R. 2140, tit. III, § 1.

101. H. R. 2140, tit. III, § 5. In exceptional cases the thirty-day period may be extended.

102. H. R. 2140, tit. III, § 6. Title III, § 3 provides that "no youth offender shall be committed to the Authority until the Board shall certify that proper and adequate treatment facilities and personnel have been provided."

103. H. R. 2140, tit. III, § 10. See *House Hearings* at 146.

104. When in October, 1941, the Judicial Conference of Senior Circuit Judges recommended the adoption of a federal indeterminate sentence law, most of the opposition to such a measure centered on its constitutionality. See Otis, *Proposed Federal Indeterminate Sentence Act* (1941) 25 J. AM. JUD. SOC. 102.

Perry, *Federal Indeterminate Sentence* (1942) 32 J. AM. INST. CRIM. L. 397, suggested, as an alternate, a plan much like the Federal Corrections Bill. For an excellent impartial analysis of the proposal for a federal indeterminate sentence law, see Hincks, *supra* note 23, at 97. See also Glueck, *Indeterminate Sentence and Parole in the Federal System: Some Comments on a Proposal* (1941) 21 B. U. L. REV. 20.

105. ARIZ. CODE ANN. (1939) § 44-2233; CAL. PEN. CODE (Deering, Supp. 1941) § 1168; COLO. STAT. ANN. (Michie, 1935) c. 48 §§ 545-550; CONN. GEN. STAT. (1930) § 6507; D. C. CODE (1940) tit. 24, §§ 201-209; FLA. STAT. ANN. (1944) tit. 46, § 956.05 (only in the case of delinquent girls in the industrial school); GA. CODE ANN. (Park, et al., 1936) § 27-2502; HAWAII REV. LAWS (1935) § 5536, LAWS OF 1941 c. 175; IDAHO CODE ANN. (1932) § 19-2413; ILL. REV. STAT. (Smith-Hurd, 1943) c. 38, §§ 802-803; IND. STAT. ANN. (Burns, 1933) §§ 9-1820, 9-1821; IOWA CODE (Reichmann, 1939) §§ 13960, 13961; KAN. GEN. STAT. ANN. (1935) §§ 62-1521; 76-2505; ME. REV. 17-18; MICH. STAT. ANN. (Henderson, 1936) §§ 28.1080, 28.1081; MINN. STAT. (Henderson, Kennedy, Scott, 1941) §§ 637.01, 637.07; NEB. COMP. STAT. (1929) §§ 29-2620, 83-1004; *id.* (Kyle, Supp. 1941) § 83-1403; NEV. COMP. LAWS (Hillyer, Supp. 1941) §§ 11,058; N. H. REV. LAWS (1942) c. 429, §§ 20, 21; N. J. STAT. ANN. (1939) tit. 2, c. 192, § 4; N. M. STAT. ANN. (Brice, Gerhart, Chase, 1941) §§ 42-1701, 42-1702; N. Y. PEN. LAW §§ 2189, 2195; N. Y. CORRECTION LAW § 230; N. C. CODE (Michie and Sublett, 1939) §§ 7738, 7748(t); N. D. COMP. LAWS ANN. (Supp. 1925) § 10,943; OHIO GEN. CODE (Page, 1937) §§ 2132, 2166; ORE. COMP. LAWS ANN. (1940) § 26-1215; PA. STAT. (Purdon, 1936) tit. 19, § 1057, tit. 61, §§ 485, 566; S. D. CODE (1939) § 34.3807; TENN. CODE

indeterminate sentence laws<sup>106</sup> provide for large maximum and small minimum sentences and grant parole boards broad discretionary powers<sup>107</sup> to release offenders. Claims that these statutes impair the judicial power vested by state constitutions in the courts have rarely succeeded,<sup>108</sup> and a similar construction will probably be given to Article 3 of the United States Constitution.<sup>109</sup> Under the proposed bill, moreover, the trial judge retains the power to reject or modify the Division's recommendations in the case of adult offenders, and to decide whether a youthful offender should be placed in the absolute custody of the Youth Authority. The new Bill, therefore, would seem not to delegate but merely to implement judicial power, by making available to the trial judge pertinent data and expert recommendations on which to base sentencing.<sup>110</sup>

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ANN. (Williams, 1934) §§ 11,766; TEX. ANN. PEN CODE, Vernon, Supp. 1943, art. 775; UTAH CODE ANN. (1943) §§ 105-36-20, 103-1-34; VT. PUB. LAWS (1933) § 8752; VA. CODE (Michie, Sublett, Stedman, 1942) §§ 1910, 4548(g) (only in the case of children and prostitutes); WASH. REV. STAT. ANN. (Remington, Supp. 1940) § 10,249-2; W. VA. CODE (Michie, Sublett, Stedman, 1943) § 6128; WISC. STAT. (Brossard, 1943) §§ 54.03, 359.05, 359.07; WYO. REV. STAT. ANN. (Courtwright, 1931, §§ 33-1301, 80-301.

106. For discussion of the history and theory of the indeterminate sentence, see BEST, CRIME AND THE CRIMINAL LAW IN THE UNITED STATES (1930) 349 *et seq.* An excellent old study of its operation in a particular state in BRUCE, BURGESS, AND HAND, THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS (1928).

Although no jurisdiction has an indeterminate sentence law by which a prisoner may be incarcerated indefinitely, many states have habitual offender laws, usually providing for life imprisonment for the fourth offense. These laws generally provide, however, that parole may be granted after fifteen years. See *e.g.*, MICH. STATS. ANN. (Henderson, 1936) §§ 28.1082-1084; CAL. PEN. CODE (Deering, 1941) § 644. See also Shumaker, *Life Imprisonment for Habitual Offenders* (1927) 31 LAW NOTES 106; Comment (1937) 51 HARV. L. REV. 345.

107. See generally, Comment (1937) 50 HARV. L. REV. 677.

108. Unsuccessful attacks have also been made on indeterminate sentence laws on the grounds that they infringe the pardoning powers of the governor; delegate legislative power by allowing an administrative board to define terms of imprisonment; make times of detention so uncertain that they inflict "cruel and unusual punishment"; are *ex post facto*; do not make penalties proportional to crimes. For cases involving these issues see *George v. People*, 167 Ill. 447, 47 N. E. 741 (1897); *Miller v. State*, 149 Ind. 607, 49 N. E. 894 (1898); *State v. Duff*, 144 Iowa 142, 122 N. W. 829 (1909); *People v. Cummings*, 88 Mich. 249, 50 N. W. 310 (1891); *State v. Dugan*, 84 N. J. Law 603, 89 Atl. 691 (1913), *aff'd* 85 N. J. Law 730, 89 Atl. 1135 (1913); *Ex parte Bates*, 20 N. M. 542, 151 Pac. 698 (1915); *State v. Peters*, 43 Ohio 629, 4 N. E. 81 (1886); *Woods v. State*, 130 Tenn. 100, 169 S. W. 558 (1914); *Mutart v. Pratt*, 51 Utah 246, 170 P. 67 (1917); *Cohn v. Ketchum*, 123 W. Va. 534, 17 S. E. (2d) 43 (1941).

The constitutionality of the indeterminate sentence laws adopted by the states is now well settled. See, *e.g.*, *Sims v. Rimes*, 84 F. (2d) 871 (App. D. C. 1936); *People v. Joyce*, 246 Ill. 124, 92 N. E. 607 (1910). For the history of indeterminate sentences and the constitutional issues involved see Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System* (1925) 16 J. AM. INST. CRIM. L. 9.

109. Opposition to the proposed federal indeterminate sentence was so vigorous, however, that challenge of the Federal Corrections Bill seems certain.

*Rehabilitation.* Although the proposed Corrections Bill <sup>111</sup> greatly improves the sentencing process, it does not attempt to alter the techniques now used for the rehabilitation of adult offenders; such reform probably must await further developments in criminology.<sup>112</sup>

With respect to juvenile offenders placed in the custody of the Youth Authority, however, the relinquishment of court sentencing jurisdiction and the broad powers granted the proposed new agency would permit utilization of numerous new techniques of treatment. Thus, subsequent to examination in the classification centers and in lieu of probation, imprisonment, or incarceration in industrial schools, offenders could be placed in foster homes, vocational institutions, training schools, farms, forestry camps, or hospitals, as may appear desirable in the individual case.<sup>113</sup> These new rehabilitation methods—designed for unhardened criminals—should help to forestall such causes of recidivism as association with habitual criminals and the degenerative effect of prison regimentation.

*Readjustment of Offenders.* The proposed Federal Corrections and Parole Improvement Bills attempt to remedy the present inadequate readjustment procedures by integrating the sentencing and paroling functions more closely and by lengthening the parole periods. Thus, under the Corrections Bill, the Adult Corrections Division is empowered not only to recommend a sentence for each offender, but also to initiate and supervise completely the offender's parole period.<sup>114</sup> The proposed Youth Authority may conditionally release a youthful offender deemed to be rehabilitated and place him under the supervision of a designated person.<sup>115</sup> Since there is no definite sentence for offenders placed in the Youth Authority's custody, there is no limit to the period of parole, except that the term must conclude six years after the date of conviction.<sup>116</sup>

110. See the dissent of Brandeis, J., in *Burns Baking Co. v. Bryan*, 264 U. S. 504 (1924); see also Waite, *Judge-Made Law and the Education of Lawyers* (1944) 30 A. B. A. J. 253. In speaking generally of the problem of judicial lack of knowledge of many subjects at bar, Waite says: "With the advent of peace and its flux of new conditions, the need for judicial legislation will pervade still wider fields of what now seems established law. The evil of insufficient knowledge will reach still greater scope unless corrected." *Id.* at 253.

111. H. R. 2140.

112. See pages 777-8 *supra*.

113. H. R. 2140, tit. III, § 2. See *House Hearings* at 144, 146; see also LASKI, *LAW AND JUSTICE IN SOVIET RUSSIA* (1935).

114. H. R. 2140, tit. IV, § 2.

115. H. R. 2140, tit. III, § 9. Such persons may be "United States probation officers, supervisory agents appointed by the Chief Parole Officer, and voluntary supervisory agents approved by the Chief Parole Officer."

116. Under H. R. 2140, tit. III, § 7 the Authority may release a youth offender conditionally at any time, and unconditionally at the expiration of one year from such conditional release. A youth must be released conditionally within four years of his conviction, and in no case may a youth be retained more than six years. Thus, for youth offenders the Act operates much like an indeterminate sentence system. See note 106 *supra*.

Under the Parole Improvement Bill, every offender sentenced to more than one year's imprisonment is subject to ordinary parole supervision for a period of two years after release.<sup>117</sup> The portion of this additional period which may extend beyond the maximum penitentiary sentence is considered part of the legal penalty.<sup>118</sup> Accordingly, upon breach of parole the parolee may be returned to prison to serve the remainder of his sentence, as lengthened by inclusion of the parole period.<sup>119</sup>

The proposed changes in parole procedure contain two significant improvements. In the first place, the minimum two-year parole period guarantees a sufficient time for supervised readjustment. Secondly, the possibility of conflict between parole and sentencing officials, illustrated by the *Tippitt* case,<sup>120</sup> is diminished.

### CONCLUSION

The partial failure of the federal penal system to re-gear originally retributive machinery to rehabilitative ends is evidenced by the prevailing high rates of recidivism.<sup>121</sup> While mere procedural reform can not eliminate all the deficiencies in the corrective process,<sup>122</sup> the changes embodied in the proposed Federal Corrections and Parole Improvement Bills should be greatly beneficial. It may be questioned, however, whether the proposed reforms go far enough in conferring authority on penological experts, in place of the present almost complete reliance on non-specialist judges. Since the judiciary is specially competent only to determine whether a suspect has committed the charged crime, restriction of the judge's function to the conduct of the trial might be desirable.<sup>123</sup> If such a restriction were supplemented by indeterminate sentence legislation,<sup>124</sup> the proposed Youth Authority and Adult Division could prescribe terms of imprisonment or corrective treatment for offenders, based on scientific analysis of individual therapeutic needs. But, however desirable such thoroughgoing reforms may be, political and legal barriers might prove impassable. Moreover, it is probable that the judge has a unique contribution to make to the sentencing process—both in synthesizing the views of

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117. H. R. 2139.

118. *Ibid.*

119. Since intractable prisoners are normally not released until the expiration of the maximum sentence, the additional period will presumably provide not only extra time for rehabilitation and readjustment, but also an extra incentive to peaceful behavior.

120. *Tippitt v. Wood*, 140 F. (2d) 689 (App. D. C. 1944).

121. See p. 779 *supra*.

122. See U. S. NAT. COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE (1931) 2-5; Comment (1940) 50 YALE L. J. 107.

123. GLUECK & GLUECK, JUVENILE DELINQUENTS GROWN UP (1940) 273; Levin, *Mr. Justice William Johnson and the Unenviable Dilemma* (1944) 42 MICH. L. REV. 803, 823-24; GAUDET, *op. cit. supra* note 33. But cf. Otis, *supra* note 104.

124. See *supra* notes 106 and 108.

the various groups of penological specialists and in representing the interests of the community as a whole. Perhaps the maximum attainable reform would be to provide—at least in the most populous districts—for selection by the President or designation by the Senior Circuit Judges of District Court Judges,<sup>125</sup> whose work would be restricted exclusively or primarily to sitting in criminal cases.<sup>126</sup> Through such procedure, both political and legal objections to more drastic reforms could be by-passed, while the advantages of expert administration of the sentencing process would be preserved.

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125. To provide for less populous areas, it might be desirable to adopt legislation authorizing the Senior Judge to assign one of the District Court Judges to try criminal cases in more than one District. While such practice might retard the processes of adjudication, the advantages to be derived from specialization in handling criminal cases appear to outweigh the harm resulting from delay.

A somewhat analogous practice of specialization was long followed in the First, Fourth, and Seventh Circuits, where complex reorganization and anti-trust cases were generally assigned to Circuit Judge Julian Mack, sitting on special assignments in the District Courts, in these Circuits.

126. The best example of judicial specialization in criminal cases is presented in the New York City courts. Misdemeanors are tried in the Court of Special Sessions of New York County and in the County Courts of the other four counties. Felonies are tried in the Court of General Sessions of the Peace of New York County, and in the County Courts of the other four counties. But this procedure has not been emulated in the rest of the state, where the County and Supreme Courts have mixed and partially concurrent jurisdiction over civil and criminal causes. See N. Y. CONST. Art. VI, § 11; N. Y. CODE OF CRIM. PROC. §§ 50-52; N. Y. CIVIL PRACTICE ACT, § 67.